Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MARILYN D. BARRINGER,

Petitioner,

v.

INDEPENDENT SCHOOL DISTRICT NO. I-89
of Oklahoma County, Oklahoma
Board of Education,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 9, 2001

QUESTIONS PRESENTED

1. Do sanctions for ex parte communications, under Rule of Professional Conduct 4.2, between a client's lawyer and constituents of an organization concerning a matter in which it is represented and without its counsel's prior consent violate the lawyer's and constituents' First Amendment rights when the scope of prohibitions is co-extensive with the non-hearsay definitions of Federal Rule of Evidence 801(d)(2)(D)?

2. Do such sanctions violate the First Amendment when constituents with interests adverse to their organization in the matter initiate such communications with the client's lawyer for the purpose of seeking legal advice, counsel, and representation?

3. Do such sanctions violate the First or Fourteenth Amendments for failure to afford fair notice of prohibited conduct when the highest state court's interpretation had not held the scope of Rule 4.2 to be co-extensive with Federal Rule of Evidence 801(d)(2)(D) or the equivalent state rule of evidence and the federal court imposed such sanctions against the client's lawyer for conduct occurring prior to its determination of such scope?

LIST OF PARTIES

The names of all parties to the proceeding in the court whose ruling is sought to be reviewed do not appear in the caption of the case and are supplemented as follows:

PETITIONER:

Marilyn D. Barringer - original counsel for plaintiff H. Michael Weeks in the district court, appellant in the United States Court of Appeals for the Tenth Circuit, and petitioner in this proceeding.

OTHERS IN COURT PROCEEDING BELOW WHO ARE NOT PARTIES IN THIS PROCEEDING:

Richard B. Wilkinson - original counsel for plaintiff H. Michael Weeks in the district court, dismissed appellant in the United States Court of Appeals for the Tenth Circuit and not a party to this proceeding.

H. Michael Weeks - plaintiff in the district court, but not a party in the Tenth Circuit or this proceeding.

RESPONDENT:

Independent School District No. I-89 of Oklahoma County, Oklahoma, Board of Education a/k/a Oklahoma City Public Schools - defendant in the district court, appellee in the United States Court of Appeals for the Tenth Circuit, and respondent in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

MARILYN D. BARRINGER[1] respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit affirming sanctions against her for violating Rule 4.2 of the Rules of Professional Conduct.

In this case the Tenth Circuit used Federal Rule of Evidence 801(d)(2)(D), which classifies as non-hearsay "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship," to frame an ethical rule enforced by disqualification prohibiting any communication between plaintiff's lawyers and any organization employee or agent regarding the matter under investigation without the organization's lawyer's consent even when such employees seek legal advice and representation from the plaintiff's lawyers.

[1]Petitioner Marilyn D. Barringer was original counsel for plaintiff H. Michael Weeks until disqualified by the district court's orders which are the subject of this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Weeks v. Independent School District No. I-89 of Oklahoma County, Oklahoma*, 230 F.3d 1201 (10th Cir., October 25, 2000) and reproduced in this *Petition* (App. pp. 1a-32a).[2] The orders of the U.S. District Court for the Western District of Oklahoma from which Petitioner appealed are unreported and appear at App. pp. 34a-44a.

STATEMENT OF JURISDICTION

The Court of Appeals filed its opinion on October 12, 2000 (App. p. 1a). Petitioner filed a timely application for extension of time in which to seek Rehearing which was granted, with the Petition for Rehearing due on November 23, 2000. Petitioner filed a timely Petition for Rehearing with a Suggestion for Rehearing En Banc which was denied Dec. 12, 2000 (App. p. 32a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

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[2]References to the attached Appendix will be: (App. (page number)). Reference to the original record on appeal will be: (R/A, (page number))

CONSTITUTIONAL, STATUTORY, AND RULES INVOLVED

Western District of Oklahoma Local Rule 83.6(b):

> The Court adopts the Oklahoma Rules of Professional Conduct as adopted and amended from time to time by the Supreme Court of the State of Oklahoma as the standard governing attorney conduct in this Court.

Oklahoma Statutes, Title 5, Chapter 1. Appendix 3-A. Rules of Professional Conduct, Transactions with Persons Other than Clients:

> **Rule 4.2**. Communication with Person Represented by Counsel[3]
>
> In representing a client, a lawyer shall not communicate, or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. [Adopted effective July 1, 1988]

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[3] The Rule and its Comments are reproduced in the Appendix at p. 45a.

Federal Rule of Evidence 801(d)(2)(C) and 801(d)(2)(D):

Rule 801. Definitions

The following definitions apply under this article:

- - - - -

(d) Statements which are not hearsay. A statement is not hearsay if --

- - - - -

(2) Admission by party-opponent. The statement is offered against a party and is

- - - - -

(C) a statement by a person authorized by the party to make a statement concerning the subject,

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

- - - - -

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D) . . .

Amendment I. Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Ratified effective December 15, 1791)

Amendment XIV. Constitution of the United States

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Ratified July 9, 1868)

STATEMENT OF THE CASE

Petitioner Barringer represented plaintiff H. Michael Weeks, a bus driver and mechanic, after his termination in a suit against the Respondent School District for claims arising under 42 U.S.C. §1983, the Americans with Disabilities Act (ADA), Title VII, and the Fair Labor Standards Act (FLSA). (App. 4a)

Michael Hix was Weeks' supervisor and residential roommate. Hix later considered his own suit against the school district. Hix communicated with Barringer about representing him. (App. 4a)

Barringer later took Hix's deposition. Hix testified in part he was harassed because of his support of the drivers and perceived unfairness and favoritism in the discharge and selective rehiring of bus drivers after a work stoppage. During questioning in deposition by the district's counsel, Hix was forced to reveal that he had consulted with Barringer about the possibility of filing his own suit. Hix later left employment with the district claiming constructive discharge.[4]

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[4]Barringer later filed suit for Hix against the district. *See Hix v. Independent School District I-89*, No. CIV-98-0576-T, WD Oklahoma. The suit was stayed pending the appeal of this case. On Feb. 14, 2001, the district court entered an order disqualifying Barringer as Hix's counsel as a result of the Tenth Circuit's decision in this case.

Barringer also took the deposition of Marilyn Midgett, an operations supervisor for the district. Midgett testified that computerized time records existed which would show overtime hours worked by Weeks. In her deposition Midgett identified numerous instances of racial tension in the transportation department including instances of "reverse racial discrimination" where blacks were favored over whites by the transportation supervisor. Midgett testified her instructions to black employees were regularly ignored by those employees unless verified by the transportation supervisor.

Midgett later sought to obtain a copy of her deposition to review for corrections. When her calls to the district's counsel were unproductive, she called Barringer who provided Midgett with a copy of her deposition and a letter from the district's counsel which indicated that Midgett had recanted her testimony about the computerized records.[5]

Midgett, alarmed she might be forced to recant her testimony, employed Barringer to represent her with regard to her deposition corrections and gave an Affidavit in which

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[5] The letter from the district's counsel stated:

> Marilyn Midget (sic) advises the District's computers cannot produce the itemized, day-by-day calendar of hours worked for Mr. Weeks, as discussed in her deposition. Let me know if you wish to re-depose Ms. Midget on this issue.
>
> (R/A, p. 91)(See Attach. 20 to Reply Brief in No. 99-6239)

she stated she had employed Barringer and denied she had made any such change in her testimony. (App. 4a and see Attach. 17, Br. in Chief, No. 99-6239)

The district filed a motion in limine to exclude any evidence obtained through the alleged ex parte communications, claiming that contact violated Oklahoma Rule of Professional Conduct 4.2 which prohibits lawyer communications with a represented party without the consent of opposing counsel. (App. 45a)

Relying upon the Oklahoma Supreme Court decision in *Fulton v. Lane*, 829 P.2d 959 (Okla., 1992) and various state statutes which define the "control group" for Oklahoma schools, Barringer and Wilkinson responded contending that *Fulton* limits ex parte communications only with employees who have "managing authority sufficient to give them the right to speak for, and bind, the corporation" *Fulton*, 829 P.2d at 960. They argued that because neither Hix nor Midgett was authorized to make final decisions or exercise speaking authority, contact with them would not be precluded by Rule 4.2.[6]

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[6] The district court recited Barringer's argument that it was the "*uncontroverted* deposition testimony of these witnesses [that] forms the basis for liability, not an admission from a party opponent as set forth in Rule 801(d)(2)." (App. 36a) The district court observed that "Rule 801 involves hearsay concerns. An exception to the hearsay rules does not govern the outcome of this dispute." (App. 36a)

The Tenth Circuit held the opposite of the district court by measuring violations of Rule 4.2 according to the admissibility of statements of employees or agents within the scope of their employment or agency under Rule 801(d)(2)(D).

The District Court applied Rule 4.2.[7] It found that because Barringer intended to use Hix and Midgett to establish the district's liability, they had "speaking authority" for the district under Rule 4.2; and it *sua sponte* disqualified Barringer (and eventually Wilkinson) from representation of Weeks and precluded the use of any evidence obtained during ex parte communications. (App. 34a-38a, 39a-41a) Barringer and Wilkinson sought reconsideration of the disqualification and, because it was based upon rules of the Oklahoma Supreme Court, sought certification of the issue to the Oklahoma Supreme Court or interlocutory appeal. They provided additional facts and arguments relating to the district court's characterization of Hix and Midgett. The district court denied reconsideration and request for alternate relief. (App. 41a-42a)

On appeal, the Tenth Circuit reviewed Rule 4.2, considered the language of *Fulton* "somewhat imprecise" (App. 14a), but determined that the standard could include "employees below the level of corporate management because otherwise the third category of employees mentioned in Rule 4.2 would be redundant to the employees described in the first category of Rule 4.2"[8]

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[7]Western District of Oklahoma Local Rule 83.6(b) adopts ". . the Oklahoma Rules of Professional Conduct as adopted and amended from time to time by the Supreme Court of the State of Oklahoma as the standard governing attorney conduct in this Court."

[8] The apparent intended reference is to the Comment to Rule 4.2 which describes prohibited communications with ". . .persons having a (continued...)

For a categorical boundary to Rule 4.2, the Tenth Circuit reasoned by analogy from Federal Rule of Evidence 801(d)(2)(D) which defines an "admission"[9] by a ". . .party-opponent as a statement that is offered against a party, and that is 'a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.' " (App. 15a-16a) The Tenth Circuit found that Hix and Midgett would fall within such a category; it rejected Barringer's and Wilkinson's arguments that Oklahoma law and the Labor Management Relations Act, 29 U.S.C. §141, do not classify support employees like Hix and Midgett as "supervisory" or "managerial" employees but define "supervisor" in a way that does not include their duties and responsibilities; and it affirmed the district court's order of disqualification. (App. 16a-22a)

The Tenth Circuit denied rehearing (App. 32a), and Petitioner now seeks review of the Tenth Circuit's decision.

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[8](...continued)
managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." (App. 14a, 46a)

[9] The heading of Rule 801(d)(2), "Admission by party-opponent," appears to be ambiguous in that the term "admission" does not seem to be used with the same meaning it has, for example, in Federal Rule of Civil Procedure 36: statements not objectionable as hearsay under Fed. Rul. Evid. 801(d)(2)(D) do not conclusively establish a matter under Fed. Rul.Civ.P. 36(b).

REASONS FOR GRANTING THE WRIT

The imposition of overlybroad restrictions on attorneys during pre-investigation and litigation phases of a case is a basis for exercise of this Court's superintending authority.

The imposition of sanctions against lawyers is a matter of federal law and therefore a proper subject for consideration by this Court even when the applicable ethical standard originates from a state.[10] Unlike its review of state court disciplinary proceedings, the Court here is not limited to constitutional, statutory, or regulatory federal questions because the exercise of judicial power by federal courts is itself a "federal question." *Frazier v. Heebe*, 482 U.S. 641, 647, Ftnte 7 (1987)("The Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system, while its authority over state-court bars is limited to enforcing federal constitutional requirements.")

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[10] *See In Re Snyder*, 472 U.S. 634, 645, Ftnte 6 (1985)(sanction under Fed. Rul. App. Pro. 46)("The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts. Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law. *Hertz v. United States*, 18 F.2d 52, 54-55 (8th Cir., 1927).") In *Snyder*, as here, the standard of professional conduct expected of an attorney was defined by ethical rules adopted by the licensing authority of an attorney's home state. *Id*.

District courts' application of local rules is reviewable here. This Court may exercise its inherent supervisory power to insure that local rules are consistent with principles of right and justice. *See Frazier v. Heebe*, 482 U.S. at 645 ("A district court's discretion in promulgating local rules is not, however, without limits. This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with ' 'the principles of right and justice.'"') citing *In re Snyder,* 472 U.S. at 643; 28 U.S.C. §2071 (Rule making authority consistent with Acts of Congress), §2072 (Supreme Court power to prescribe general rules of practice).

The Tenth Circuit's use of the hearsay principles of Fed. Rul. Evid. 801(d)(2)(D) to frame Rule 4.2 of Professional Conduct appears to prohibit any contact by retained civil lawyers or prosecutors with an employee or agent of a represented organization. The decision destroys the essential distinction between employees or agents whose testimony might not be subject to objection as hearsay and those who may be fairly said to have "speaking authority" for the organization. While testimony of an employee or agent may be adequate to resist summary judgment, it may not necessarily bind the corporation in the sense that the corporation is irrevocably foreclosed from rebuttal.

The Tenth Circuit's decision is not narrowly drawn to limit communications for an important government interest but rather affords unfairly broad protection to organizations

and, through the uncertainties of the factors in Rule 801(d)(2)(D), creates a trap for the unwary.[11]

I. THE TENTH CIRCUIT DECISION IMPROPERLY BURDENED THE FIRST AMENDMENT RIGHTS OF BARRINGER AND WILKINSON IN THEIR REPRESENTATION, AND THE CORRELATIVE RIGHTS OF WEEKS, HIX, AND MIDGETT TO SEEK, COMMUNICATE AND CONSULT WITH THE ATTORNEYS OF THEIR CHOICE.

The Tenth Circuit decision accords little or no weight to the material facts that Michael Hix and Marilyn Midgett, both employees of the school district, took positions adverse to the district and separately sought individual representation from Barringer.[12] Their adverse interest became apparent

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[11]Barringer contends that the federal rules material to admissions by persons with "speaking authority" which may bind the organization and with whom communications are properly regulated by Rule 4.2 are statements made pursuant to Fed.R.Civ.P. 30(b)(6), Fed.R.Civ.P. 36, or defined under Fed.Rul.Evid. 801(d)(2)(C).

[12] Both the district court and the Tenth Circuit recognized that Midgett and Hix separately employed Barringer as counsel (App. 4a, 35a), yet neither took into account their rights to be represented by the counsel of their choice absent some identifiable conflict of interest.

Barringer and Wilkinson raised the issue that because Midgett and Hix had adverse interests of their own against the school district, they were unrepresented parties who could not be represented by its counsel. (No. 98-6293, Br. Chf., Prop. III, p .36; Reply; No.99-6239, Reply)

during the deposition of Midgett when she criticized certain actions and events in the school district, including claims of its racial discrimination, and gave testimony about the existence of computer records which was challenged by the district's lawyer as incorrect.[13]

Prior to his deposition Hix sought out and communicated and consulted with Barringer about litigation to vindicate his own interests and claims against the school district.

Petitioner contends that employees with adverse claims against a represented organization become unrepresented persons under Oklahoma Rules of Professional Conduct 1.13(d), (e), Comment (Organization as Client)(See Rules 1.7 (Conflicts of Interest) and 4.3 (Dealing with Unrepresented Person)). Rule 4.2 should not prohibit communications with employees seeking their own separate representation, even with lawyers already representing other employees. *See Browning v. A.T.&T. Paradyne*, 838 F.Supp. 1564 (MD Fla., 1993)(Rule prohibiting ex parte communications not applicable when former manager is discharged and brings suit using attorney of former employees whose discharge he reviewed. In such an instance, plaintiffs' lawyers cannot be logically accused of having ex parte communications with their own clients).

Although the Tenth Circuit acknowledged that Hix and Midgett had become Barringer's clients, it gave inadequate

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[13] While testifying about the existence of computer records, Midgett was impeached by the district's lawyer who stated on the record, ". . . And I do not believe this witness is accurate in some of her testimony about what the computers are capable of producing." (R/A, 86-7)

consideration to the significance of that relationship by failing to apply the exception for constituents with their own counsel recognized at the end of the second paragraph in the Comment to Rule 4.2. When constituents are separately represented, Rule 4.2 does not require consent by the organization's counsel, and the ethical focus shifts to Rule 1.7 which deals with conflicts of interest.

Barringer might reasonably have assumed that Midgett and Hix were unrepresented when they initially sought her out because of the conflict that existed between those employees and the district. *See State, ex rel. Oklahoma Bar Association v. Harper*, 995 P.2d 1143, 2000 OK 6 (Okla., 2000); Okla. R. Prof. Conduct 4.3 (Dealing with Unrepresented Person).

This Court has recently reiterated that attorneys have First Amendment rights to actively represent their clients' interests. *Legal Services v. Velazquez*, No. 99-603 and 99-960, 2001 WL 193738 (U.S. Feb. 28, 2001) If, as Barringer contends, Hix and Midgett were unrepresented persons particularly because of their adverse interest to the school district, then they had a right to choose their own counsel. Unwarranted, vague, or overbroad restrictions on the types of communications they may have with their lawyer enforced by penalty of sanction parallel the abridgements of expression forbidden in *Velazquez*. *See also U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990)(Attorney has standing on behalf of third party litigants where enforcement of restriction prevents third party from entering into relationship with litigant (typically a contractual relationship) to which

relationship the third party has legal entitlement (typically a constitutional entitlement))

Restrictions on an attorney's ability to communicate with other employees who may have parallel claims (such as Hix) or who seek the opportunity to investigate and determine the efficacy of class certification may also trigger First Amendment concerns. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100 (1981) *See also Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State Bar*, 377 U.S. 1, 5-6, 7-9 (1964)(First Amendment right of members of fraternal organization to consult with each other concerning need for legal assistance and to recommend lawyers was inseparable part of constitutionally guaranteed right, and lawyers accepting such employment have like constitutional protection which state cannot abridge) The Tenth Circuit's rule can prevent or unreasonably hinder investigation of common claims, numerosity, and the other elements of class action, and limit communications to class members while making it more difficult for attorneys to get information from potential class members.

II. THE TENTH CIRCUIT'S DECISION DEPARTS FROM THE OKLAHOMA SUPREME COURT'S INTERPRETATION OF THE RULE IN FULTON V. LANE AND SO DENIED FAIR NOTICE OF THE PROHIBITED CONDUCT.

Fulton recognized that Rule 4.2 may "extend beyond those employees controlling the corporation" but held that Rule 4.2 applied only to "employees if they have managing

authority sufficient to give them the right to speak for, and bind, the corporation." *Fulton*, 829 P.2d at 960.

The Tenth Circuit decision characterized the *Fulton* standard as "somewhat imprecise." (App. 14a) The concurring opinion characterized Rule 4.2 and its Comment as "ambiguous in several important respects," so that it was "unclear precisely what was intended by the Comment's use of the phrase, 'persons having managerial responsibility on behalf of the organization,'" and stated "Likewise, the phrase persons 'whose statements may constitute an admission on the part of the organization' can be interpreted in a number of different ways." (App. 28a) The Tenth Circuit rejected Barringer's analysis showing that state statutes covering "support employees" and "bargaining units" defined and clearly distinguished "nonsupervisory" from "managerial" employees (App. 16a-18a), although such analysis could fairly and objectively define employees with "speaking authority" or "managerial responsibility."

While acknowledging that Rule 4.2 and *Fulton* may be "imprecise" or "ambiguous," Barringer contends *Fulton* imposes substantial restrictions on the application of the Rule it interprets and that the new construction adopted by the Tenth Circuit is inconsistent with those restrictions.

First, "Rule 4.2 does not prohibit communications with all . . . employees and former employees." *Fulton*, 829 P.2d at 960. The Tenth Circuit's application of 801(d)(2)(D) forbids or effectively discourages communications outside formal discovery with all employees or agents in litigation or prelitigation phases.

Non-hearsay statements of employees or agents are not the functional equivalent of "managerial authority" or "speaking authority." Under the Tenth Circuit's decision, consultation with employees or agents who have no knowledge ". . .concerning a matter within the scope of the agency or employment" involving the event in question continues to be irrelevant, while ex parte communications with those who can make such a statement are forbidden.

Second, as the Tenth Circuit noted, *Fulton* explains its "speaking authority" test with citations to *Chancellor v. Boeing* 678 F.Supp. 250, 252-53 (D.Kan., 1988) and *Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 P.2d 564, 567 (Wash., 1984). Yet the Circuit deviated from *Fulton* when it adopted a rule much more restrictive than either *Chancellor* or *Wright*.

For example, in *Chancellor*, the district judge prohibited interviews with witnesses having managerial responsibility and other employees involved in the denial of promotions in such a way that their actions as agents could be imputed to the corporation for purposes of civil liability.[14] *Chancellor*, 678 F.Supp. at 253-54. The essential holding in *Wright* was that current employees should be considered "parties" for the

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[14] The *Chancellor* court specifically named the employees it determined were involved in the subject of the suit. Unlike those employees, neither Hix or Midgett had authority to correct, adjust, or modify any of Weeks' four claims nor could they hire and fire him. Even the transportation director could not hire or fire Weeks, but could only make a recommendation to the district superintendent who then presented matters to the Board of Education.

purpose of the disciplinary rule if, under applicable Washington law, they have managing authority sufficient to give them a right to speak for, and bind, the corporation. In both cases, the courts contemplated something less than prohibiting ex parte communications with all employees with knowledge of the facts.

Until the district court's and the Tenth Circuit's decisions, Petitioner could have reasonably assumed that the construct of Oklahoma law under *Fulton* provided the proper framework for analysis of Rule 4.2. Attorneys are entitled to fair notice of prohibited conduct, and regulations which fail to afford fair notice are "void for vagueness" as offering an impermissible risk of discriminatory enforcement. *See Gentile v. State Bar of Nevada*, 501 S.Ct. 1030, 1048-50 (1991) Now Barringer, like Gentile, when conforming herself to the Rule, "must guess at its contours." *Id*. *See In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir., 1990):

> In examining the district court's order of suspension, the relevant inquiry is whether the attorney can be deemed to have been on notice that the courts would condemn the conduct for which he was sanctioned. *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., Concurring). This would necessarily include behavior which responsible attorneys would recognize as improper for a member of the profession. *Id*. at 555." . . . A court should "not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would

differ in appraising the propriety of that conduct." *Id* at 556 (White, J., Concurring)).

This Court should address the rule now established by the Tenth Circuit. Unless one concludes that all employees are always off-limits, the Tenth Circuit's *Weeks* decision is far more restrictive but not substantially more precise in its application than the Rule as differently interpreted by *Fulton*. If an attorney seeks to interview an employee or agent, any inquiry must begin with the "scope of agency or employment" while the attorney tries simultaneously to ascertain the witness's knowledge of the "matter" within that scope and to avoid any communication about it.

Finally, this Court should review the Tenth Circuit's interpretation of Rule 4.2 as inherently unfair in that it offers an unreasonable advantage to organizations not enjoyed by individuals. For example, imagine an injury accident between a nonemployee and a company vehicle driven by an employee that takes place in the company's workyard in the presence of only company employees. Under the Tenth Circuit's rule, the nonemployee's attorney is prohibited from pre-suit interviews with any employee-witness without permission of the company's defense lawyer. However, if the same accident occurred downtown during rush hour, Rule 4.2 would not prevent a plaintiff's attorney from interviewing witnesses who may have seen the accident but who were not corporate employees.[15]

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[15] This hypothetical is modified from Stephen M. Sinaiko, *Ex Parte* (continued...)

The Tenth Circuit's reliance on Fed.R.Evid. 801(d)(2)(D) is problematic because a rule of admissibility addresses itself to evidence not subject to objection as hearsay (but thereby now shielded from informal discovery under the Circuit decision), as opposed to evidence which may, under the facts of the case, "bind" the organization in the sense of an admission under Fed.Rul.Civ.P. 36. 801(d)(2)(D) arises out of concern for circumstantial guarantees of trustworthiness that bedevil hearsay, and it does not establish a presumption of "speaking authority" that triggers ethical restrictions on ex parte interviews. In contrast to statements under Fed.R.Evid. 801(d)(2)(C) which bear the authority of the organization, an 801(d)(2)(D) statement does not of necessity bind the organization but may be rebutted or disclaimed.

To take the accident hypothetical a step further, imagine that a company supervisor is standing on a public street corner at the time of the accident when the company driver runs a red light. Should the supervisor be subject to interview by plaintiff's attorney? Probably yes, since his testimony is no different from a by-stander's, does not bind the company to liability, but could raise sufficient factual support to overcome a defendant's summary judgment. Could plaintiff's attorney interview the company driver? No,

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[15](...continued)
Communication and the Corporate Adversary: A New Approach, 66 N.Y.U.L. Rev. 1456 (Nov. 1991)(Reviewing problems with Rule 4.2, including difficulties associated with measuring its standard by Rule 801(d)(2)(D))

because the driver's statement that he ran the red light forecloses the corporation from rebutting or disclaiming the testimony.

III. A RECENT SEVENTH CIRCUIT DECISION AND THE DECISION OF THE TENTH CIRCUIT REPRESENT A DIVISION OF AUTHORITY WITH THE NINTH CIRCUIT'S INTERPRETATION OF A SIMILAR PROVISION OF CALIFORNIA'S LAW.

Petitioner recognizes that a split of authority between Courts of Appeal on questions of individual rules adopted by different district courts is not a true division of the circuits under this Court's Rule 10. Nevertheless, this Court is empowered to see that local rules are consistent with principles of right and justice. *See Frazier v. Heebe* 482 U.S. at 645.

As noted in the previous section, the Tenth Circuit's decision is inconsistent with the Oklahoma Supreme Court's interpretation in *Fulton v. Lane*, and the district court's decision cites no local federal decision holding a different interpretation of the Oklahoma rule. As Judge Briscoe noted in her concurring opinion, differing ethical rules between federal and state courts create "difficulties for practitioners in Oklahoma." (App. 29a) Judge Briscoe also notes divergent interpretations of Rule 4.2 discussed in academic literature. (App. 28a-29a), *See e.g.*, Jeffrey D. Wohl, *Ethical Obligations of Employment Lawyers*, 615 PLI/Lit 1033, 1060-64 (1999) (discussing various court interpretations of

Rule 4.2); Stephen M. Sinaiko, *Ex Parte Communication and the Corporate Adversary: A New Approach*, 66 N.Y.U.L. Rev. 1456 (Nov. 1991)(same)

The Ninth Circuit interpreted a similar provision of the California Rules of Professional Conduct in *United States v. Talao*, 222 F.3d 1133 (9th Cir., Aug. 23, 2000). (No ethical violation occurred when an assistant United States attorney spoke to an employee bookkeeper of the target after the bookkeeper expressed an intention not to be represented by counsel for the target because ". . . she wished to tell the truth and . . . she did not believe she could do so if she had to testify in his presence."[16])

The Seventh Circuit also used Rule 801(d)(2)(D) recently to establish a violation of a parallel Rule 4.2 of an Illinois federal district court. In *Weibrecht v. Southern Illinois Transfer, Inc.*, 2001 WL 194429 (7th Cir., Feb. 27, 2001), the Seventh Circuit considered an apparent conflict between Rule 4.2 and Section 60 of the Federal Employers' Liability Act, 45 U.S.C. §60. Holding the conduct of the lawyer violated Rule 4.2, the court applied 801(d)(2)(D) to find that the witness with whom the lawyer had contact or had caused contact by his client, could make a statement characterized

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[16] Statements by the bookkeeper witness may have been classified under the narrower provisions of 801(d)(2)(C), and thus communication by opposing counsel would be subject to Rule 2-100, the California equivalent of Oklahoma Rule 4.2. The effect of the Ninth Circuit's holding, however, is that because of the conflict of interest issue that arises under the equivalent of Oklahoma Rule 1.7, lawyer communication with the witness is not subject to Rule 2-100.

as an "admission" under the evidence rule. 2001 WL 194429 at *7 *Weibrecht* also notes that some version of the ethical rule prohibiting contact with represented parties is in force in every U.S. jurisdiction (*See* Restatement (Third) of the Law Governing Lawyers, Sec. 158, cmt. b (1998)), and that there is "vigorous debate" on how the rule should be applied. Restatement (Third) of the Law Governing Lawyers, Sec. 159, reporter's note; Ernest F. Lidge, III, The Ethics of Communicating with an Organization's Employees, 45 Ark. L.Rev. 801 (1993), cited at 2001 WL 194429 at *5.

This division and debate over a national standard of an important rule signifies a need for guidance. Whatever the nuances of Rule 4.2, a Commission of the American Bar Association has recently rejected the approach of the Tenth Circuit and the use of Rule 801(d)(2)(D) as the measure for Rule 4.2 violations.[17]

The Commission's draft revision of Rule 4.2 deletes that portion of the Comment relied upon by the Tenth Circuit (". . any other person ... whose statement may constitute an admission on the part of the organization") and criticizes it as a "broad and potentially open-ended reference" because "This reference has been read by some as prohibiting communications with any person whose testimony would be admissible against the organization as an exception to the hearsay rule." (Para. 7, App. 50a), Model Rule 4.2, *See* Reporter's Explanation of Changes (Para. 7, App. 55a)

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[17] Appendix G is an excerpt from the Draft Report of the ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000) with proposed revisions to Model Rule 4.2.

CONCLUSION

Civil lawyers, like prosecutors, depend upon the discovery and investigation of facts about matters in which organizations are represented. This case turns on what constituents of these organizations are properly subject, under rules of ethics, to a communication embargo with such lawyers, what notice of that prohibition such lawyers must have before sanctions are imposed, and whether constituent employees have a fundamental right to choose as their own counsel a lawyer already representing another employee in a suit against the employer organization when their interests are adverse to their employer's.

The restrictions on lawyer communications imposed by the Tenth Circuit's rule bar any employees or agents from seeking representation from a plaintiff's counsel in the same matter unless that counsel first obtains the organization's lawyer's consent; the employees or agents would *a priori* be required to permit disclosure to their employer of an otherwise confidential consultation.

Petitioner respectfully suggests that such an ethical regulation restricting communications unfairly burdens plaintiff's lawyers in the investigation of their clients' cases, provides protection to corporate parties well in excess of that necessary to prevent contact with employees or agents who could be fairly said to be "represented" by corporate counsel, affects the First Amendment rights of plaintiffs, their attorneys, and other employees or agents by failing to

acknowledge that such employees or agents may have their own conflicts with the organization which compel them to seek their own counsel, and exacerbates the difficulty and expense of litigation by permitting a party to forbid any communication with its employees or agents except through formal discovery.

Petitioner Barringer respectfully requests that this Court exercise its superintending authority to correct the application of Rule 4.2 to protect the free speech rights of attorneys and the employees and agents who seek separate counsel from that of their principal organization. This case presents important unresolved and conflicting questions about the federal application of Rule 4.2 and fair notice of prohibited conduct. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Reported at 230 F.3d 1201 (10th Cir., 2000)

(FILED OCTOBER 25, 2000)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

H. MICHAEL WEEKS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
INDEPENDENT SCHOOL DISTRICT NO. I-89, of Oklahoma County, Oklahoma, Board of Education,	)	
	)	No. 98-6293,
	)	98-6382,
Defendant-Appellee,	)	99-6239
	)	
	)	
MARILYN D. BARRINGER; *RICHARD B. WILKINSON*,	)	
	)	
	)	
Attorneys-Appellants.	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-96-1692-C)

Michael (sic) C. Salem, Norman, Oklahoma (Marilyn D. Barringer and Richard B. Wilkinson, Oklahoma City, Oklahoma, with him on the briefs), for Appellants.

Laura L. Homes and Timothy M. Melton of The Center for Education Law, Inc., Oklahoma City, Oklahoma, for Defendant-Appellee.

Before **EBEL**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **BRISCOE**, Circuit Judge.

EBEL, Circuit Judge.

This case involves three companioned appeals by attorney Marilyn D. Barringer ("Barringer").[1] Barringer

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[1]Attorney Richard B. Wilkinson ("Wilkinson") failed to sign the notices of appeal for these appeals, and thus is not a proper appellant before this court. *See* 10th Cir. R. 3.1; Fed. R. App. Pro. 3(c)(2). After oral argument, Barringer and Wilkinson filed a motion to supplement the (continued...)

served as original counsel for H. Michael Weeks ("Weeks") in an action brought against Independent School District No. 89 ("School District"). Prior to trial, the district court entered an order disqualifying Barringer from further participation in the litigation because of improper ex parte communications. Weeks, with new counsel, subsequently prevailed on some of his claims. After the judgment, the district court granted a motion by the School District to reduce Weeks' award of costs to exclude costs for depositions connected with Barringer's ethical violations. The district court then awarded attorney fees to Weeks, but for an amount less than he had originally requested. Barringer appeals the disqualification ruling, the reduction in costs, and the amount of attorney fees the court awarded Weeks. We affirm the disqualification ruling, and we hold that Barringer lacks standing to appeal the reduction in costs and the amount of attorney fees.

I. BACKGROUND

A. Disqualification

Barringer represented Weeks, a former bus driver of the

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[1](...continued)
record, part of which asked that the court add a pleading to the entries of appearances to include an entry for Wilkinson. That part of their motion was denied as untimely because the proposed pleading was not filed in the district court until January 31, 2000 and was not part of the timely notice of appeal. *See* Order of March 2, 2000.

Oklahoma City Public Schools, in his claims against the School District under [42 U.S.C.] §1983, the Americans with Disabilities Act ("ADA"), Title VII, and the Fair Labor Standards Act ("FLSA"). During pretrial discovery, a dispute arose between the parties over the availability and relevance of certain information requested by Weeks relating to his FLSA claims for failure to pay him proper overtime compensation. The existence and relevance of the information was raised during Barringer's deposition of Marilyn Midgett ("Midgett"), an operations supervisor for the School District. On behalf of Weeks, Barringer subsequently filed a motion to compel discovery of certain documents, including documents referred to during Midgett's deposition. The district court denied the motion because the document request included information relating to a time period outside the relevant two-year period of limitations, and concerned information relating to employees other than the plaintiff. Barringer filed a motion to reconsider, and attached an affidavit from Midgett.

Through discussions during a settlement conference and through the affidavit of Midgett that was attached to the motion to reconsider the motion to compel discovery, the School District learned that Barringer had engaged in ex parte communications with Midgett. The School District also had information indicating that Barringer had engaged in similar communications with Michael Hix ("Hix"), Weeks' immediate supervisor, regarding matters relevant to Weeks' case. The School District had further learned that Barringer had begun to represent Midgett and was considering representing Hix. The School District thus filed a motion for

a protective order to prohibit Weeks and Barringer from conducting ex parte communications with any of its present or former supervisory personnel, and a motion to exclude evidence obtained through any ex parte communications that may have already occurred. The School District argued that Barringer's conduct violated Rule 4.2 of the Oklahoma Rules of Professional Conduct,[2] which, in the case of an organization, prohibits communications with persons who have managerial responsibility for the organization that is the opposing party, with persons whose act or omission in connection with the matter can be imputed to the organization for purposes of liability, and with persons whose statement may constitute an admission on the part of the organization. The School District claimed that both Midgett and Hix were employees with whom communications were prohibited under Rule 4.2. Although Hix no longer worked for the School District when the motion for a protective order was filed, he had been employed with the School District at the time of the alleged ex parte communications.[3] The School District

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[2] Pursuant to local rule, the federal district court used the Oklahoma Rules of Professional Conduct to assess Barringer's conduct. *See* W.D. Okla. LCvR 83.6(b).

[3] The alleged ex parte communications between Barringer and Hix were revealed at Hix's deposition on August 20 and 21, 1997, when Hix was still employed with the School District. During the deposition, counsel for the School District asked Hix if he had ever met with Barringer concerning Weeks' lawsuit. Barringer objected to the question and informed Hix that he had the right to assert the attorney/client privilege.

asked that the court prohibit Barringer from contacting any of its present or former supervisory personnel, specifically Midgett and Hix, exclude any evidence obtained from Midgett and Hix, and strike Midgett and Hix as witnesses.

In response to the School District's motion, Barringer did not dispute that she engaged in ex parte communications with Midgett and Hix after they were identified as witnesses by the School District; rather, she contended that because both Midgett and Hix were "low-level supervisory employees" with no authority to make management decisions that bind the School District, ex parte communications with them were not prohibited under Rule 4.2. To support the assertion that Midgett and Hix lacked sufficient authority to speak on behalf of the School District, Barringer cited state statutes defining school "administrators" and describing the management structure for local school districts. Barringer also cited policy justifications as to why such communications should be allowed in this instance.

The district court found a violation of Rule 4.2 and sua sponte disqualified Barringer from further participation in the case as counsel for Weeks and prohibited her from engaging in ex parte communications with Midgett and Hix. The court also prohibited Weeks from using any evidence obtained through ex parte communications with Hix and Midgett at trial, permitting only their deposition testimony to be introduced. The court recited the Oklahoma Supreme Court's interpretation of Rule 4.2 as applying "only to those employees who have the legal authority to bind a corporation in a legal evidentiary sense, *i.e.*, those employees who have 'speaking authority' for the corporation." The court was not

persuaded by Barringer's citation of the state statutes on school administrators, and found that "[f]rom the materials provided to the Court, it clearly appears that plaintiff intends to use Midgett and Hix as individuals with 'speaking authority' for the defendant." Stating that "it is the attorney Marilyn Barringer and not the plaintiff [Weeks] who should bear the impact of Barringer's conduct," the court found disqualification of Barringer the proper remedy for the violation.

In a brief conference at the bench immediately after the court issued its disqualification order, attorney Wilkinson admitted that he also had consulted with both Midgett and Hix, and, pursuant to the court's order, should also be prohibited from further representation of Weeks. The court then directed that the previous order disqualifying Barringer be extended to include Wilkinson. The case was then stricken from the November 1997 docket and reset for a future trial docket.

On November 20, 1997, Barringer and Wilkinson filed a motion to reconsider the disqualification order and request for alternative relief. In their brief, they again raised the issue of the status of Hix and Midgett as employees with "speaking authority" to bind the School District. Barringer and Wilkinson claimed that because Midgett and Hix were not listed on an organizational chart, were included in the support personnel "bargaining unit," as defined by Okla. Stat. tit. 70, § 509.2(A)(3), and were not included as "supervisory" employees in the Support Personnel Report submitted by the School District to the Oklahoma State Department of Education, they could not be considered

"supervisors" under any standard. They supported their argument by drawing an analogy to the Labor Management Relations Act (LMRA), which defines "employee" to exclude supervisors, *see* 29 U.S.C. § 152(3), and, according to them, defines "supervisor" in a way that does not include the duties and responsibilities of either Midgett or Hix, *see* 29 U.S.C. § 152(11).

In the event that the court denied their motion to reconsider, Barringer and Wilkinson asked that the court certify to the Oklahoma Supreme Court the question of whether uncertified support personnel included within a collective bargaining agreement negotiated for a support employee bargaining unit are part of the "control group" contemplated by Rule 4.2. Alternately, they asked that the court permit an interlocutory appeal to the Tenth Circuit. The district court denied the motion to reconsider and request for alternate relief, stating that although disqualification is an extreme sanction, it was appropriate under these facts.

Prior to denying Barringer and Wilkinson's motion to reconsider, the district court granted the School District's motion for summary judgment as to Weeks' *Title VII* claim, and granted in part and denied in part its motion for partial summary judgment on the issue of FLSA overtime pay. After the disqualification of Barringer and Wilkinson, Weeks obtained new counsel and, after the presentation of Weeks' case in chief, the trial court granted the School District's motion for judgment as a matter of law with respect to Weeks' ADA claim. The jury returned a judgment in favor of Weeks on his due process and FLSA claims, and he was awarded damages in the amount of $20,000 for his due

process claim and $1,800 for his FLSA claim. Weeks did not appeal any of these rulings.

B. Costs

On June 23, 1998, Weeks filed his bill of costs with supporting brief and his motion for attorney fees with supporting brief. The School District filed objections to the bill of costs and motion for attorney fees, contending in part that it should not have to pay for the depositions of Midgett and Hix because of Weeks' counsels' bad faith in connection with those depositions. The clerk taxed costs against the School District in the amount of $3,480.05, which included the cost of the depositions of Hix ($868.00) and Midgett ($612.75). The School District filed a motion and brief asking the district court to review the costs taxed by the court clerk against the School District, and to reduce the costs taxed by $1,480.00, the total of the amounts claimed for the depositions of Midgett and Hix. This motion was served on Barringer and Wilkinson. Neither Barringer and Wilkinson, nor Weeks, through his present counsel, responded to the School District's motion.

The district court granted the School District's motion, agreeing with the School District that because of Barringer's conduct regarding Midgett and Hix, the interests of justice would be served by denying a recovery of costs for their depositions. The court also noted the lack of a response to the School District's motion. The award of costs was reduced accordingly.

C. Attorney Fees

With regard to attorney fees, the district court found that Weeks was the prevailing party in the litigation; however, the court did not allow recovery for time spent on the unsuccessful claims. The court also found that Weeks' request for attorney fees exceeded a reasonable number of hours and represented an excessive hourly rate. The court stated that it would not award a rate in excess of $150.00 per hour and referred the matter to a magistrate judge to follow that guideline. The court also prohibited recovery for any of Barringer's or Wilkinson's time dedicated to the issue of attorney conflict at any time after the date of the order of disqualification.

After receiving a proposed final billing statement from Weeks' original counsel (Barringer and Wilkinson), the magistrate judge filed a recommendation reducing the fee request from $54,823.50 to $42,746.70. Barringer and Wilkinson appealed the magistrate's recommendation. They contended the trial court should have considered the market evidence as to a reasonable hourly rate, and they objected to the denial of additional fees and the twenty percent reduction in fees based on the limited success of the litigation. The district court affirmed, but directed the parties to confer regarding some additional expenses, and report to the court. Barringer and Wilkinson filed a pleading requesting $1,933.77 in unreimbursed expenses.[4] The court denied any

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[4] This amount was calculated by reducing the amount of expenses (continued...)

additional costs because Barringer and Wilkinson did not show that the costs were reasonable or provide sufficient itemization.

Barringer now appeals (1) the district court's November 10, 1997 disqualification order and its February 10, 1998 order denying the motion to reconsider the disqualification[5]; (2) the district court's September 2, 1998 order granting the School District's motion to review taxation of costs, which denied Weeks the costs for the depositions of Midgett and Hix; and (3) the district court's April 15, 1999 order awarding attorney fees in an amount less than Barringer believes should have been awarded.

II. DISCUSSION

A. Standing to Appeal the Disqualification Order

The School District argues that Barringer does not have standing to appeal the disqualification order issued against

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[4](...continued)
Barringer and Wilkinson had billed ($4,670.02) by amounts reimbursed by Weeks ($1,255.50) and amounts disallowed for Hix and Midgett's depositions ($868.00 and $612.75, respectively).

[5] The School District filed a motion to dismiss the appeal of the disqualification order for failure to file a timely appeal. Barringer's notice of appeal was incorrectly docketed as being filed on July 9, 1998, one day after the thirty-day period for filing an appeal had expired. Because the docket was ultimately corrected to reflect the actual July 8, 1998 filing date, we deny the School District's motion to dismiss.

her. We disagree. Counsel have standing to appeal orders that directly aggrieve them. *See Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854-55 (10th Cir. 1993); *see also Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1149 (10th Cir. 1991) (stating that the plaintiff's attorney, not the plaintiff, is the proper party to appeal from a sanction imposed on the attorney). The disqualification order is a sanction directly affecting Barringer, and a favorable court decision would likely provide at least some redress from the injury from the sanction because it could help ameliorate the damage to her professional reputation from the sanction order. *See Johnson v. Board of County Comm'rs*, 85 F.3d 489, 492-93 (10th Cir. 1996) (finding that an appeal of a disqualification order was not moot, even though the underlying case had settled, as long as the disqualification order rested on grounds that could harm the attorney's professional reputation). Thus, Barringer has standing to appeal the disqualification order.[6]

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[6] The School District cites *Cities Serv. Co. v. Gulf Oil Corp.*, 976 P.2d 545 (Okla. 1999), to support its argument that Barringer lacks standing. In *Cities Serv. Co.*, the Oklahoma Supreme Court held that attorneys lacked standing to challenge a trial judge's bench rulings which, by way of sanction, limited their participation in the proceedings. *See* 976 P.2d at 547-49. We find *Cities Serv. Co.*, distinguishable from the present case. The court that decided *Cities Serv. Co.*, specifically limited its decision to the "facts and circumstances, *particular to this case . . .*" *Id.* at 546. The sanctions imposed on the attorneys in *Cities Serv. Co.* were less drastic in nature than the sanction at issue here because they did not disqualify the attorneys entirely from taking part in the proceedings;

(continued...)

B. The Disqualification Order

"[O]rdinarily the control of attorneys' conduct in trial litigation is within the supervisory powers of the trial judge, and is thus a matter of judicial discretion." *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994) (further quotations and citations omitted). The trial court's factual findings regarding the conduct of attorneys will not be disturbed unless there is no reasonable basis to support those conclusions. *See id.* We review de novo the trial court's interpretation of the applicable rules of professional responsibility and the trial court's interpretation of a statute. *See id.*

At the time of the district court's disqualification ruling, Rule 4.2 stated as follows:

> **Communication with Person Represented by Counsel**
>
> In representing a client, a lawyer shall not communicate, or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

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[6](...continued)
rather they merely limited the attorneys' participation in specific aspects of the trial. In any event, we are governed by our prior authority in *Johnson v. Board of County Comm'rs*.

Okla. Stat. Ann. tit. 5, Ch. 1, App. 3-A (1997).[7] The comments to the rule stated:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Id. In interpreting the rule and comments, the Oklahoma Supreme Court has stated: "Rule 4.2 applies to only those employees who have the legal authority to bind a corporation in a legal evidentiary sense, *i.e.*, those employees who have 'speaking authority' for the corporation," which, according to that court, means those who have "the right to speak for, and bind, the corporation." *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992). Although this standard is somewhat imprecise, we know it includes employees below the level of corporate management because otherwise the third category

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[7] The rule has been modified slightly since 1997. It now states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Okla. Stat. Ann. tit. 5, Ch. 1, App. 3-A (1998).

of employees mentioned in Rule 4.2 would be redundant to the employees described in the first category of Rule 4.2 ("persons having a managerial responsibility on behalf of the organization").

Consistent with *Fulton*, the district court interpreted Rule 4.2 as applying to School District employees who had "speaking authority" such that they could bind the School District in a legal evidentiary sense. We agree with this interpretation, which is also consistent with other courts' interpretation of the same language. *See*, *e.g.*, *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 252-54 (D. Kan. 1988) (eschewing the control group test and adopting the managing-speaking agent test); *Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984) (*en banc*) (adopting managing-speaking agent test).[8]

Fed. R. Evid. 801(d)(2)(D) provides guidance in determining whether an employee has such speaking authority, although it can offer only assistance by analogy because it addresses a different issue: hearsay, rather than ethical rules. *See Chancellor*, 678 F. Supp. at 254; *see also* Geoffrey C. Hazard, Jr. & W. William Hodes, *Defining a 'Represented Person'*, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct §4.2:105, at 740 (1998). Rule 801(d)(2)(D) defines an admission by a party-opponent as a statement that is offered against a party, and that is "a statement by the party's agent or servant concerning a matter within the scope of the agency or

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[8] *Chancellor* and *Wright* were cited by and approved by the Oklahoma Supreme Court in *Fulton*. *See Fulton*, 829 P.2d at 960.

employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D).

Barringer does not dispute that she engaged in ex parte communications with Hix and Midgett. Thus, in assessing the application of Rule 4.2 to the present case, there are really only two questions for us to consider with respect to both Midgett and Hix. First, we must decide whether Midgett and Hix, with whom Barringer had ex parte communications, had "speaking authority" such that they could bind the School District in a legal evidentiary sense. Second, we must determine whether the ex parte communications concerned the subject of Weeks' case. We review the district court's factual findings on these questions under a clearly erroneous standard. *See Naimie v. Cytozyme Lab., Inc.*, 174 F.3d 1104, 1109 (10th Cir. 1999).

Barringer argues that to answer the question of whether Midgett and Hix have speaking authority sufficient to bind the School District, we should consider the Oklahoma School Code's definition of "support employee" and its description of appropriate bargaining units.[9] According to Barringer,

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[9] The Oklahoma School Code defines "support employee" as follows:

> For purposes of this Act, "support employee" means a full-time employee of a school district as determined by the standard period of labor which is customarily understood to constitute full-time employment for the type of services performed by the employee who is employed a minimum of one hundred seventy-two (172) days and who provides those services, not performed by professional educators or licensed teachers, which are necessary for the efficient (continued...)

Midgett and Hix are support employees included within the support personnel bargaining unit, and thus cannot be "supervisory" or "managerial" employees within the meaning of Rule 4.2. Barringer also argues that because the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 et seq. (1998), prohibits supervisors from inclusion in a bargaining unit and further defines "supervisor" in a way that does not include the duties and responsibilities of Midgett or Hix, Midgett and Hix cannot be "supervisory" employees of the School District.

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[9](...continued)
and satisfactory functioning of a school district and shall not include adult education instructors or adult coordinators employed by area vocational-technical school districts.

Okla. Stat. Ann. tit. 70, § 6-101.40. The Oklahoma School Code provides for the following collective bargaining units:

> 1. Employees who are employed and certified as principals and assistant principals and who have responsibilities for the supervision of classroom teachers shall constitute an appropriate unit;
>
> 2. All other employees who are required by the position in which employed to be licensed or certified as teachers or entry year teachers as those terms are defined in Section 1-116 of this title and who do not hold supervisory authority with respect to other teachers in the district shall constitute an appropriate unit; and
>
> 3. All employees who are not required by their job description to be a principal, licensed or certified teacher, superintendent or other administrator shall constitute a separate bargaining unit.

Okla. Stat. Ann. tit. 70, § 509.2(A)(1-3).

We, like the district court, find Barringer's citations to the Oklahoma School Code and the LMRA unpersuasive. First, those statutes have entirely different purposes than the professional conduct rule governing ex parte communications. Second, they provide no assistance in discerning which employees are covered under Rule 4.2 because the test for determining whether an employee falls within the scope of Rule 4.2 is not strictly whether the employee is designated as "supervisory" or as a "support employee." Rather, the test refers to agency principles and asks whether the employee has management speaking authority such that he or she could bind the School District in a legal evidentiary sense.

Midgett stated in her deposition that her position was "operations supervisor," and that her duties included "oversee[ing] all the office personnel; mak[ing] sure that everything was properly handled, all the correspondence and everything; attendance; overtime; field trips; and mak[ing] sure that routing was done." In the affidavit submitted with the Plaintiff's Motion to Reconsider Plaintiff's Motion to Compel Discovery, Midgett stated that she was responsible for "overseeing subordinate employees in the performance of activities relating to the compensation of school bus drivers and other support employees of the Transportation Department." The deposition also revealed that Midgett's position had provided her with extensive experience in handling and overseeing overtime information. For example, the following exchange took place:

Q Had your duties ever involved checking overtime claims or additional time sheets, for their validity?

A Yes.

Q And during what period of time did they include that?

A Ever since I was operations supervisor. 1984.

Q Through '95?

A Uh-huh

One of the significant areas of dispute in Weeks' case involved the School District's handling of his overtime during his employment, which was from 1989 through 1995.

This evidence persuades us that Midgett was an employee with whom Barringer was prohibited from communicating under Rule 4.2. Midgett had managerial authority over some of the issues in controversy in the underlying litigation, particularly overtime issues. Under agency principles, it seems to us that she was vested with managerial speaking authority on the areas within her responsibility. Her testimony could be considered against her employer in a legal evidentiary sense.

The evidence indicates that the ex parte communications between Barringer and Midgett concerned School District procedures for calculating overtime, including any overtime specifically owed to Weeks. Because this constituted

communication about the subject of Weeks' claim against the School District by an employee who had speaking authority from the School District, the district court correctly found a violation of Rule 4.2.[10]

With regard to Hix, the evidence indicates that he was Weeks' immediate supervisor, and that Barringer considered him a "manager" within the School District. Hix referred to the bus drivers as "my employees," and Weeks had to have Hix sign off on his overtime claims. As with Midgett, we agree with the district court's finding that Hix had managerial authority over at least some of the issues in the

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[10] Barringer submitted as supplemental authority to this court *State ex rel. Okla. Bar Ass'n v. Harper*, 995 P.2d 1143 (Okla. 2000), to support her argument that no violation of Rule 4.2 occurred. In *Harper*, the court found no violation of Rule 4.2 because the bar association had failed to make the requisite showings that (1) the communication in question concerned a matter on which the insured was represented or (2) that the attorney had actual knowledge that the insured was represented by an attorney. *See Harper*, 995 P.2d at 1147-48. The present case is distinguishable for several reasons. First, as we stated above, the communication between Midgett and Barringer concerned Weeks' case. Second, *Harper* did not involve communication with an employee of an organization, thus there was no need to assess whether the person had speaking authority sufficient to bind the organization in a legal evidentiary sense. Finally, in *Harper*, the attorney involved in the communications had several bases for believing that the person in question was *not* represented by an attorney, including specific evidence to that effect. *See id.* at 1145-1146 (recounting facts), 1148 (stating that "[t]he records that Respondent received from GEICO reflected that Tenequer was unrepresented at the time Respondent took her statement"). That is not the case here. Thus, *Harper* does not impact our decision in this case.

underlying litigation. Again, Fed. R. Evid. 801(d)(2)(D) bolsters this conclusion. If Hix made a statement against the School District on an overtime issue that was within the scope of his agency or employment and made during the existence of the relationship, that statement would be admissible evidence that could be considered against the School District. *See* Fed. R. Evid. 801(d)(2).

The content of Hix's ex parte communications with Barringer is less clear than the content of Midgett's communications with Barringer. When the School District's attorney asked Hix during Barringer's deposition of Hix whether Hix had ever had conversations with Barringer concerning Barringer's representation of Weeks, Barringer told Hix he could assert the attorney client privilege. When Hix was subsequently asked whether he had ever discussed Weeks' lawsuit with Barringer, he answered in the negative. The evidence indicates that at the time of the deposition, Barringer was considering representing Hix in a lawsuit similar to the one in which she was representing Weeks.

This evidence is sufficient to uphold the district court's finding that Barringer had prohibited communications with Hix concerning the subject matter of the litigation. However, it is not necessary to rely on Barringer's communications with Hix to affirm the disqualification order of Barringer. Barringer's communications with Midgett are sufficient to support the disqualification order, regardless of the nature of her communications with Hix.

In imposing, sua sponte, the sanction of disqualification for the violation of Rule 4.2, the district court noted that it was the attorney, Barringer, and not the plaintiff, Weeks,

who should bear the impact of Barringer's conduct. For that reason, the district court rejected the alternative remedy of excluding the testimony of Hix and Midgett from Weeks' case. In its subsequent order denying Barringer's motion to reconsider the disqualification, the district court noted that although disqualification was an extreme sanction, it was appropriate under these circumstances.

Disqualification may be ordered as a remedy for a violation of Rule 4.2. *See, e.g., Faison v. Thornton*, 863 F. Supp. 1204, 1215 (D. Nev. 1993) (discussing appropriate sanctions for violations of Rule 4.2); *Shelton v. Hess*, 599 F. Supp. 905, 911 (S.D. Tex. 1984) (finding disqualification appropriate for improper *ex parte* contacts between defendant and plaintiff's counsel). A district court has broad discretion in imposing the remedy of disqualification. *See EEOC v. Orson H. Gygi Co.*, 749 F.2d 620, 621 (10th Cir. 1984) ("Except where a purely legal issue is involved, a district court's order of disqualification will be reversed only if the court has abused its discretion."); *Faison*, 863 F. Supp. at 1215 ("The court has broad discretion in fashioning an appropriate penalty or sanction to remedy the problems caused by an attorney's improper *ex parte* communications with a party represented by counsel.") (citation omitted). After a thorough examination of the record in this case, we conclude that the district court did not abuse its discretion in disqualifying Barringer for her violation of Rule 4.2.

Barringer, citing *Fullmer v. Harper*, 517 F.2d 20, 21 (10th Cir. 1975), argues that prior to imposing the disqualification sanction, the district court was required to hold an evidentiary hearing. In **Fullmer**, this court,

reviewing the district court's denial of a motion to disqualify, stated:

> In our view the verified motion to disqualify raises ethical questions that are conceivably of a serious nature. In such circumstance a written response should be required. The trial court should then hold a full evidentiary hearing on the issues posed by the motion to disqualify and the response thereto, which hearing should include the taking of testimony. A motion of this type should not be resolved on the basis of mere colloquy between court and counsel. At the conclusion of such hearing the trial court should then make specific findings and conclusions, to the end that this court will then have a record before it which will permit a meaningful review, should review be sought.

See Fullmer, 517 F.2d at 21. We believe that the rationale behind *Fullmer* is inapplicable to the present case for several reasons. First, Barringer and Wilkinson did not dispute that ex parte communications had occurred; thus there was no need for any additional evidence to be presented to the court on that issue. Second, the district court already had in front of it considerable evidence regarding the status of both Midgett and Hix within the School District, as well as evidence regarding the substance of Barringer's ex parte communications with Midgett. Third, the district court's decision was not resolved on the basis of mere colloquy between court and counsel; rather it was made after thorough briefing by the parties on all of the issues involved. Fourth,

in *Fullmer*, the basis for the court's decision was that the record before it was inadequate to permit a review of the denial of the motion to disqualify. *Id.* at 21. Here, the record is extensive and the court made specific findings and conclusions with respect to the disqualification order such that meaningful review of the matter is possible. Therefore, we do not believe the district court erred in failing to conduct a full evidentiary hearing on the issue.

A final argument advanced by Barringer regarding the disqualification order is that the School District's October 24, 1997 motion for protective order and motion to exclude evidence were untimely. Barringer cites *Redd v. Shell Oil Co.*, 518 F.2d 311 (10th Cir. 1975), a case in which this court held that the late filing of a motion to disqualify for a conflict of interest, on the Friday preceding a Monday trial date, justified the court's summary rejection of the motion. *See Redd*, 518 F.2d at 315. Barringer argues that the School District's motion was an "eleventh hour" motion akin to the motion filed in *Redd*. We disagree. *Redd* involved a motion to disqualify because of conflict of interest for prior representation. The parties knew or should have known of the alleged conflict much sooner than the eve of trial when they filed the motion. Here, the School District did not receive adequate information as to the ex parte communications between Barringer and Midgett until October 22, 1997, when Barringer filed the motion to reconsider her motion to compel discovery and attached the affidavit from Midgett. The School District's motion was filed just two days later, over two weeks prior to the November 10, 1997 trial

date.[11] Barringer had an opportunity to respond to the motion, and did so on November 3, 1997. We therefore do not find the School District's motion untimely.

For the reasons discussed above, we affirm the district court's order disqualifying Barringer for violating Rule 4.2.

C. Standing to Appeal the Order reducing Weeks' Award of Costs

Although counsel have standing to appeal orders directly affecting them, they do not have standing to appeal orders only applicable to their clients. *See Uselton*, 9 F.3d at 854. Rule 54(d) of the Federal Rules of Civil Procedure specifies that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). "Prevailing party" refers

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[11] Barringer argues that the School District must have been aware of her communications with Hix as of August 1997, when Hix was deposed by Barringer. Hix's deposition testimony in August 1997 may have raised the School District counsel's suspicions that Barringer had had ex parte communications with Hix, *see supra*; however, when asked at the deposition whether he had ever discussed Weeks' lawsuit with Barringer, Hix responded that he had not. Even if the School District had learned of improper ex parte communications with Hix in August 1997, the School District's October 22, 1997 motion, over two weeks prior to trial, was not an "eleventh hour" motion like the one in *Redd*. Moreover, because we rely on Barringer's communications with Midgett, not Hix, in affirming the district court's disqualification for violating Rule 4.2, and the School District did not learn of those communications until October 22, 1997, we find Barringer's arguments on this point irrelevant.

to the party, not the attorney. *See Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) (discussing this in the context of a claim for attorney's fees under 42 U.S.C. §1988); *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227, 1230 (10th Cir. 1998) (same). Therefore, the district court's order reducing Weeks' award of costs is an order directly applicable only to Weeks. Barringer does not have standing to appeal that order.

D. Standing to Appeal the District Court's Attorney Fees Order

As stated above, counsel have standing to appeal orders directly affecting them, but do not have standing to appeal orders only applicable to their clients. *See Uselton*, 9 F.3d at 854. An order awarding or denying attorney fees is an order applicable to the client, not the client's counsel. *See Howard*, 150 F.3d at 1230 (holding that attorney lacked standing to complain of loss of attorney fees under 42 U.S.C. §1988); *see also Pontarelli v. Stone*, 978 F.2d 773, 775 (1st Cir. 1992) ("[A]n attorney lacks separate standing to appeal from a judgment awarding or denying fees to a party, since such concessions are granted to parties, not their attorneys."). The district court's attorney fees order is an order directly applicable only to Weeks, which Barringer does not have standing to appeal.

III. CONCLUSION

Accordingly, we AFFIRM the district court's

disqualification order. We conclude that Barringer lacks standing to appeal the district court's orders on the reduction in costs and the award of attorney fees, and thus we DISMISS the appeal as to those issues.

Nos. 98-6293, 98-6382, 99-6239
Weeks v. Independent School District No. 1-89

BRISCOE, Circuit Judge, concurring:

I concur in the result, but write separately to briefly express my views regarding the interpretation of Oklahoma Rule of Professional Conduct 4.2. At the time of Barringer's *ex parte* contacts with Hix and Midgett, Rule 4.2 provided:

> In representing a client, a lawyer shall not communicate, or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Okla. Stat. tit. 5, Ch. 1, App. 3-A, Rule 4.2 (1996). The critical question we are asked to decide is whether Hix and/or Midgett can be considered "parties" for purposes of Rule 4.2. More specifically, because Hix and Midgett are not named parties to the action, the question is whether they can be considered synonymous with the District for purposes of this litigation. *See Niesig v. Team I*, 558 N.E. 2d 1030, 1033

(N.Y. 1990) ("In litigation only the entity, not its employee, is the actual named party; on the other hand, corporations act solely through natural persons, and unless some employees are also considered parties, corporations are effectively read out of the rule.").

To determine the meaning of the word "party," the best starting point is the Comment to Rule 4.2, which (as of 1996) provided, in pertinent part:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Okla. Stat. tit. 5, Ch. 1, App. 3-A, Rule 4.2, Comment (1996). Although the Comment provides some assistance, it is ambiguous in several important respects[1], and has thus been interpreted in widely divergent ways by federal and state courts. *See, e.g.*, Jeffrey D. Wohl, *Ethical Obligations*

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[1] For example, it is unclear precisely what was intended by the Comment's use of the phrase "persons having a managerial responsibility on behalf of the organization." Likewise, the phrase persons "whose statements may constitute an admission on the part of the organization" can be interpreted in a number of different ways.

of Employment Lawyers, 615 PLI/Lit 1033, 1060-64 (1999) (discussing various interpretations of Rule 4.2 adopted by the courts); Stephen M. Sinaiko, *Ex Parte Communication and the Corporate Adversary: A New Approach*, 66 N.Y.U.L. Rev. 1456 (Nov. 1991)(same).

The Oklahoma Supreme Court has previously wrestled with the ambiguities of Rule 4.2 and has held that "[i]n litigation involving corporations, Rule 4.2 applies to only those employees who have the legal authority to bind a corporation in a legal evidentiary sense, i.e., those employees who have 'speaking authority' for the corporation." *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992). Although we are not bound by *Fulton*, *see Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994) (indicating that ethical rules in federal proceedings are subject to a national standard), it would arguably create difficulties for practitioners in Oklahoma were we to adopt an interpretation of Rule 4.2 different from that adopted by the Oklahoma Supreme Court. *See Weider Sports Equip. Co. v. Fitness First, Inc.*, 912 F. Supp. 502, 510 (D. Utah 1996) (noting that if a federal court interprets Rule 4.2 in a manner different from the highest state court of the state in which the federal court sits, it "could create problems for counsel by not knowing where the case was going to be litigated and which standard applied"); *see generally Hill v. St. Louis Univ.*, 123 F.3d 1114, 1121 (8th Cir. 1997) (interpreting Rule 4.2 of the Missouri Supreme Court Rules of Professional Conduct in a manner identical to the interpretation adopted by the Missouri Supreme Court).

The problem, however, is that *Fulton*'s interpretation of

Rule 4.2 is itself ambiguous. In holding that the rule "applies to only those employees who have the legal authority to bind a corporation in a legal evidentiary sense," 829 P.2d at 960, the opinion cites two cases with contrasting interpretations of Rule 4.2. The first case, *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 252-53 (D. Kan. 1988), broadly construes Rule 4.2 in a manner consistent with Fed. R. Evid. 801(d)(2)(D), and prohibits ex parte contact whenever the proposed interview would concern matters within the scope of the employee's employment. The second case, *Wright by Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984), construes Rule 4.2 in a more narrow fashion, holding that it precludes ex parte contact only with those employees who "have managing authority sufficient to give them the right to speak for, and bind, the [employer] corporation." In other words, "[b]ecause the *Wright* managing-speaking agent test examines the authority of individuals to speak for the corporation, it points to the group of employees who, because they are 'authorized by the party to make a statement,' can make statements constituting evidentiary admissions under Rule 801(d)(2)(C) of the Federal Rules of Evidence." Sinaiko, *supra* at 1485 (internal footnotes omitted).

Given the ambiguities of *Fulton*, we are thus left to interpret Rule 4.2 on our own. Weighing the strengths and weaknesses of the available interpretations, I agree with the majority that we should adopt an interpretation consistent with Fed. R. Evid. 801(d)(2)(D)'s "scope-of-employment" test. Although I am admittedly concerned about the effect this interpretation will have on a party's ability to obtain

information from an opposing corporate party, I am persuaded that it is the only interpretation that adequately protects a corporate party against the prejudice of ex parte communications with its employees. *See*, *e.g.*, Association of the Bar of the City of New York Comm. on Professional Ethics, Op. No. 80-46 (undated) ("We believe that the corporation's right to effective representation can be guarded adequately only by viewing all present employees of a corporation as 'parties' . . . where the proposed interview concerns matters within the scope of the employee's employment."); *see generally* Michael H. Graham, *Federal Practice and Procedure* § 6723 at 184-88 ("all that is required [for a statement to be admissible] is that [it] concern a matter within the scope of the agency or employment, and that the agent or servant still be employed at the time of making the statement").

In light of this interpretation, I further agree with the majority that Barringer was prohibited from engaging in *ex parte* communications with Hix and Midgett, because both were deposed concerning matters within the scope of their employment. In particular, Hix, as Weeks' immediate supervisor, was questioned about the details of Weeks' termination. Midgett, as operations supervisor for the transportation department, was questioned about how requests for overtime compensation were processed, and how overtime and payroll records were maintained. Finally, both Hix and Midgett were questioned about whether a racially hostile working environment existed within the transportation department.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

H. MICHAEL WEEKS,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
INDEPENDENT SCHOOL DISTRICT NO. I-89, of Oklahoma County, Oklahoma, Board of Education,	)	
	)	
	)	
	)	No. 98-6293, 98-6382 and 99-6239
Defendant-Appellee,	)	
	)	
	)	
MARILYN D. BARRINGER; *RICHARD B. WILKINSON*,	)	
	)	
	)	
Attorneys-Appellants.	)	

ORDER
Filed December 12, 2000

Before **EBEL**, **McWILLIAMS** and **BRISCOE**, Circuit Judges.

This matter is before the court on appellants' "Petition for Rehearing with Suggestion for Hearing by the Court En Banc of Appellants' Original Counsel Marilyn D. Barringer and Richard B. Wilkinson." Also before the court is appellee's bill of costs, filed November 15, 2000.

Appellants' petition for rehearing is denied. The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appellee's bill of costs is denied as untimely. See Fed. R. App. P. 39(d)(1) (bill of costs must be filed within 14 days of the date of the judgment).

Entered for the Court
PATRICK FISHER, Clerk of Court

s/Jeanne E. Herrick-Stare
JEANNE E. HERRICK-STARE
Counsel to the Clerk/Deputy Clerk

APPENDIX C

(FILED NOVEMBER 10, 1997)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

H. MICHAEL WEEKS,	)	
	)	
Plaintiff	)	
	)	
vs.	)	No. CIV-96-1692-C
	)	
INDEPENDENT SCHOOL DISTRICT NO. I-89 OF OKLAHOMA COUNTY, OKLAHOMA, BOARD OF EDUCATION, a/k/a OKLAHOMA CITY PUBLIC SCHOOLS,	)	
	)	
Defendant	)	

ORDER

On October 24, 1997, defendant filed a motion for protective order, which contained a request to exclude evidence. The motion was prompted by plaintiff's counsel's contacts with defendant's employees. Marilyn Midgett, defendant's supervisory employee, was deposed and

thereafter had several discussions with Marilyn Barringer, plaintiff's lawyer. Barringer now apparently also represents Marilyn Midgett. A similar situation occurred with Michael Hix. His is a former supervisor in defendant's transportation department. While he was still employed, Hix was deposed in August, 1997. In response to inquiries regarding whether Hix had any contact with Ms. Barringer, Ms. Barringer interposed the issue of attorney/client privilege. Hix then asserted this privilege. These unusual events prompted a request from the lawyers for the defendant. They ask that Barringer be directed not to have any further contact with any of the defendant's present or former employees regarding this case. Additionally, defendant requests exclusion of any evidence obtained through any *ex parte* communications that may have already occurred, and an order striking Hix and Midgett as witnesses.

On November 3, 1997, plaintiff responded to defendant's motion for protective order. In that pleading, Barringer admits after the defendant identified Hix and Midgett as witnesses the conduct about which defendant complains occurred. Barringer contends that the *ex parte* communications described above do not violate the rules of professional conduct and were necessary to obtain proper discovery. To reach these conclusions, Barringer provides an analysis of state statutes that define school administrators. Barringer also argues that Hix and Midgett are not within a "control group" capable of making final decisions or employees who are authorized to speak for the defendant. The defendant has reported that at the settlement conference Barringer advised those present that:

> she considers the statements of Defendant's supervisory employees [Midgett and Hix] as admissions of liability in reference to Plaintiff's Fair Labor Standards Act claim. She specifically indicated that the deposition testimony of Plaintiff's supervisors regarding the payment of overtime was an admission of liability.

Defendant's Brief on Motion for Protective Order, p. 2 (Oct. 24, 1997). Through the District's witnesses Hix and Midgett it is obvious that Barringer hopes to establish the District's liability. This is not denied by Barringer who explains it is the

> *uncontroverted* deposition testimony of these witnesses [that] forms the basis for liability, not an admission from a party opponent as set forth in Rule 801(d)(2), Fed. R. Evid. Neither Midgett nor Hix can make such an admission; however, their uncontroverted testimony concerning the failure to property calculate overtime compensation is certainly a basis for liability.

Plaintiff's Response Brief at 16 (Nov. 3, 1997). Rule 801 involves hearsay concerns. An exception to the hearsay rules does not govern the outcome of this dispute. Here, the problem has arisen because plaintiff's counsel, without the agreement or knowledge of defendant's counsel, made contact with defendant's employees, Midgett and Hix, and discussed this litigation.

Oklahoma's Rules of Professional Conduct provides:

> In representing a client, a lawyer shall not communicate about the subject of representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

50 Okla. Stat. Ch. 1, App. 3-A, rule 4.2.

As stated by the Oklahoma Supreme Court:

> Rule 4.2 applies to only those employees who have the legal authority to bind a corporation in a legal evidentiary sense, i.e., those employees who have "speaking authority for the corporation."

Fulton v. Lane, 829 P.2d 959 (Okla., 1992)(citations omitted) From the materials provided to the Court it clearly appears that plaintiff intends to use Midgett and Hix as individuals with "speaking authority" for the defendant. Thus, the prohibition of Rule 4.2 applies.

The Court must then determine what remedy is appropriate. A suggestion from the defendant is to exclude the testimony of Hix and Midgett. If the Court chooses this path, this would inhibit, and perhaps prohibit, plaintiff's opportunity to adduce evidence in support of his Fair Labor Standards Act claim. Any adverse impact as a result of improper conduct is usually imposed on the party or individual responsible. Thus, it is the attorney Marilyn Barringer and not the plaintiff who should bear the impact of

Barringer's conduct. Richard Wilkinson appears as co-counsel for the plaintiff. There is no suggestion that Wilkinson also represents Hix and Midgett. The trial of the case is imminent. The Court concludes the appropriate remedy is to prohibit Barringer's further participation in this case as counsel for plaintiff. Barringer is also prohibited from engaging in any *ex parte* communications with Hix and Midgett. Further, at trial plaintiff will not be allowed to use any evidence obtained through the *ex parte* communications with Hix and Midgett, but may use only the testimony adduced at these witnesses' depositions.

IT IS THEREFORE ORDERED that defendant's motion for protective order is hereby GRANTED as set out more fully herein.

IT IS SO ORDERED this 10 day of November, 1997.

s/Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX D

(FILED FEBRUARY 10, 1998)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

H. MICHAEL WEEKS,	)	
	)	
Plaintiff	)	
	)	
vs.	)	No. CIV-96-1692-C
	)	
INDEPENDENT SCHOOL DISTRICT NO. I-89 OF OKLAHOMA COUNTY, OKLAHOMA, BOARD OF EDUCATION, a/k/a OKLAHOMA CITY PUBLIC SCHOOLS,	)	
	)	
Defendant	)	

ORDER

In an Order entered November 10, 1997, the Court prohibited plaintiff's counsel Marilyn Barringer from further participation in this case and from engaging in any *ex parte* communications with witnesses Michael Hix and Marilyn Midgett. The Court also announced it would not permit

plaintiff to use at trial any evidence obtained through Barringer's *ex parte* communications with Hix and Midgett. The Court entered the prohibition order after learning that Barringer had several *ex parte* contacts with Hix and Midgett. Barringer now represents both Hix and Midgett.

Plaintiff, speaking through Barringer and Wilkinson, now asks the Court to reconsider its ruling and to either certify a question to the Oklahoma Supreme Court or amend the November 10, 1997, Order to include a statement that would allow an interlocutory appeal. They have supplied additional facts and arguments on the topic of whether the Court properly characterized employees Hix and Midgett in its November 10, 1997, Order. An additional unopposed request is to amend the Order to make it consistent with the discussion the parties had with the Court on November 10, 1997. This later request involves the inclusion of plaintiff's co-counsel, Richard Wilkinson, as another individual covered by the Court's prohibition.

At the time of Barringer's contact with Hix and Midgett, these individuals were among those listed as defendant's witnesses. Hix is a former supervisor in defendant's transportation department. When Hix gave his deposition in August 1997, he was still an employee of the defendant. At his deposition, Hix asserted the attorney/client privilege because of his association with Barringer. At the time of her deposition and presently, Midgett is an operations supervisor in defendant's transportation department. The Court found that Hix and Midgett fell within the group of employees who could bind the defendant in a legal evidentiary sense.

Disqualification of counsel is an extreme sanction and

one appropriate under these facts. The Court is not excluding what Hix and Midgett said on any evidentiary issue during their depositions or testimony they may give at trial. The Court is excluding Barringer and Wilkinson because they violated the rule of professional conduct that prohibits communications "with a party the lawyer knows to be represented by another lawyer in the matter." 50 Okla. Stat. Ch. 1, App. 3-A, Rule 4.2 The best option available under these facts is to allow the plaintiff to proceed to trial, but require that he not be represented by Barringer or Wilkinson.

The Court will deny the request to certify a question for resolution by the Oklahoma Supreme Court. Answering a question regarding contacts with Hix and Midgett is not determinative of an issue in this pending litigation. 20 Okla. Stat. § 1601, *et seq*.

The Court will also deny the request to insert language making possible an interlocutory appeal. Movants have offered nothing that shows an immediate appeal could materially advance the end of this litigation. 28 U.S.C. § 1292(b).

The Court will grant the motion insofar as it requests an amendment that shows Richard Wilkinson is also subject to the prohibition announced in the Court's November 10, 1997, Order. The Court will deny the motion in all other respects.

IT IS THEREFORE ORDERED that plaintiff's motion to reconsider is hereby granted in part, and denied in part, as set forth above.

IT IS SO ORDERED this 10 day of February, 1998.

s/Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX E

(FILED FEBRUARY 10, 1998)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

H. MICHAEL WEEKS,	)	
	)	
Plaintiff	)	
	)	
vs.	)	No. CIV-96-1692-C
	)	
INDEPENDENT SCHOOL DISTRICT NO. I-89 OF OKLAHOMA COUNTY, OKLAHOMA, BOARD OF EDUCATION, a/k/a OKLAHOMA CITY PUBLIC SCHOOLS,	)	
	)	
Defendant	)	

ORDER

In an Order entered November 10, 1997, the Court prohibited Marilyn Barringer from appearing as counsel for the plaintiff in this case. The Court amended this ruling to include Richard Wilkinson. Plaintiff's request to change the prohibition ruling has been denied. Because plaintiff is now

unrepresented, the Court will allow plaintiff sixty (60) days in which to obtain new counsel or announce his decision to appear *pro se*. Any pleadings filed meanwhile shall be forwarded to the plaintiff by Barringer or Wilkinson. The Court extends the time in which plaintiff must respond to defendant's motion for partial summary judgment to April 6, 1998. This case will be placed on the Court's May 1998 trial docket.

IT IS THEREFORE ORDERED that plaintiff shall obtain new counsel within sixty (60) days or announce his decision to appear *pro se*. Plaintiff's response to defendant's motion for partial summary judgment is due April 6, 1998.

IT IS SO ORDERED this 10 day of February, 1998.

s/Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX F

OKLAHOMA STATUTES ANNOTATED, TITLE 5.
CHAPTER 1.--APPENDIX 3-A.
RULES OF PROFESSIONAL CONDUCT
TRANSACTIONS WITH PERSONS
OTHER THAN CLIENTS

Rule 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate, or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. [Adopted effective July 1, 1988.]

COMMENT

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so.

Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

CODE COMPARISON

This Rule is substantially identical to DR 7-104(A)(1).

OKLAHOMA MODIFICATION

Oklahoma added the language "or cause another to communicate" to ABA Model Rule 4.2 to emphasize that the lawyer should not do indirectly what the lawyer cannot do directly.

APPENDIX G

Excerpt from
AMERICAN BAR ASSOCIATION
Commission on Evaluation of the Rules of
Professional Conduct (Ethics 2000)

DRAFT REPORT[1]
(With Reporter's Explanation of Changes)
[Issued November 27, 2000]

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law ~~to do so~~ or a court order.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the

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[1]The report can be downloaded in its entirety at the following URL: http://www.abanet.org/cpr/e2k-whole_report_home.html. Rule 4.2 can be downloaded at http://www.abanet.org/cpr/e2k-rule42.html.

matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

~~[1]~~ [2] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. ~~Also, parties~~ Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. ~~Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.~~

[3] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to

communicate with a governmental official. For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decisionmakers, may permit a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.

~~[2]~~ [4] Communications authorized by law may also include ~~constitutionally permissible~~ investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings~~, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions~~. When communicating with a represented criminal defendant, a government lawyer must comply with this Rule in addition to honoring the defendant's constitutional rights. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[5] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is

necessary to avoid reasonably certain injury.

~~[3]~~ [6] This Rule ~~also~~ applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

~~[4]~~ [7] In the case of ~~an~~ a represented organization, this Rule prohibits communications ~~by a lawyer for another person or entity concerning the matter in representation~~ with ~~persons having a managerial responsibility on behalf~~ a constituent of the organization~~, and with any other person~~ who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with ~~that~~ the matter may be imputed to the organization for purposes of civil or criminal liability ~~or whose statement may constitute an admission on the part of the organization~~. Consent of the organization's lawyer is not required for communication with a former constituent. If ~~an agent or employee~~ a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule

3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

~~[5]~~ [8] The prohibition on communications with a represented person only applies~~, however,~~ in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See ~~Terminology~~ Rule 1.0(f). ~~Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed.~~ Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

~~[6]~~ [9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Model Rule 4.2

Reporter's Explanation of Changes

TEXT:

Add reference to "court order"

Although a communication with a represented person pursuant to a court order will ordinarily fall within the "authorized by law" exception, the specific reference to a court order is intended to alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are described generally in Comment [5].

After consideration of concerns aired by prosecutors about the effect of Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special rules governing communications with represented persons by government lawyers engaged in law enforcement. The Commission concluded that Rule 4.2 strikes the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system.

COMMENT:

[1] This new Comment states the purposes served by Rule 4.2 and, in particular, emphasizes that the Rule is designed

not merely to protect individual clients but also to enhance the proper functioning of the legal system.

[2] This contains the substance of current Comment [1]. The last sentence has been deleted and its subject addressed in Comment [3]. A new sentence clarifies that Rule 4.2 does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not representing a party in the matter. Also, material has been added from the commentary to Rule 8.4(a) emphasizing that a lawyer may not make a communication prohibited by this Rule through the acts of another. At the same time, parties are not precluded from communicating with one another, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

[3] This essentially new Comment elaborates the final sentence of current Comment [1] relating to whether communications with represented government officials may be "authorized by law." It alerts lawyers to the possibility that a citizen's constitutional right to petition and the public policy of ensuring a citizen's right of access to government decisionmakers may create an exception to this Rule, allowing a lawyer to communicate with government officials "who have authority to take or recommend action in the matter."

[4] This Comment substantially revises current Comment [2] on the applicability of the Rule's "authorized by law" exception to communications by government lawyers,

directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. The reference in current Comment [2] to judicial precedent has been deleted, and the relationship between the Rule and applicable constitutional limits on government conduct has been reformulated. In place of the statement that the Rule imposes ethical restrictions that "go beyond" those imposed by constitutional provisions, the Commission explains that the fact that a communication does not violate the constitution "is insufficient to establish" that the communication is permissible under the Rule. For example, the fact that an individual has waived the constitutional right to consult the individual's lawyer at the time of arrest "is insufficient to establish" the ethical propriety of an ex parte communication by the government with that individual if the individual's lawyer has not agreed to the communication. In reformulating the relationship between the Rule and applicable legal or constitutional requirements, the Commission intends no substantive change in the applicable standard.

[5] This new Comment explains the two circumstances in which a lawyer may seek a court order authorizing a communication: 1) where a lawyer is uncertain whether or not the communication is permitted by Rule 4.2; and 2) where a communication is prohibited by the Rule but "exceptional circumstances" nonetheless justify it. The example given is where ex parte communication with a represented person is necessary to avoid reasonably certain injury.

[6] This Comment revises current Comment [3] by adding two new sentences. The first makes clear that the protections accorded by Rule 4.2 may not be waived by the client. The second addition addresses situations in which a lawyer does not know at the initiation of a communication that a person is represented by counsel but finds out later. It reminds lawyers that they must terminate communication once they learn that the person is represented by counsel in the matter to which the communication relates. No change in substance is intended.

[7] This Comment modifies current Comment [4] identifying the constituents of a represented organization with whom a lawyer may not communicate without the consent of the organization's lawyer. The current Comment's inclusion of all "persons having a managerial responsibility on behalf of the organization" has been criticized as vague and overly broad. As reformulated, the Comment contains the more specific reference to "a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter." In focusing on the constituent's authority in the matter at issue and relationship with the organization's lawyer, the Comment provides clearer guidance than the broad general reference to "managerial responsibility."

In addition, the reference in the current Comment to a constituent whose act or omission in the matter may be imputed to the organization for purposes of civil or criminal

liability has been retained. However, the Commission deleted the broad and potentially open-ended reference to "any other person ... whose statement may constitute an admission on the part of the organization." This reference has been read by some as prohibiting communication with any person whose testimony would be admissible against the organization as an exception to the hearsay rule.

A new sentence has been added to clarify that consent of the organization's lawyer is not required for communications with former constituents. The Commission, however, has added a warning to lawyers that Rule 4.4 precludes the use of methods of obtaining evidence that violate the legal rights of the organization.

[8] The penultimate sentence of current Comment [5] has been deleted because it suggests incorrectly that the required element of knowledge can be established by proof that the lawyer had "substantial reason to believe" that the person was represented in the matter. This is inconsistent with the definition of "knows" in Rule 1.0(f), which requires actual knowledge and involves no duty to inquire.